CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 462

J. F. FITZGERALD CONSTRUCTION COMPANY, PETITIONER,

vs.

CHRIS PEDERSEN, INDIVIDUALLY AND AS AGENT AND REPRESENTATIVE FOR AND IN BEHALF OF HIMSELF, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1944.

CERTIORARI GRANTED DECEMBER 18, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

J. F. FITZGERALD CONSTRUCTION COMPANY, PETITIONER,

vs.

CHRIS PEDERSEN, INDIVIDUALLY AND AS AGENT AND REPRESENTATIVE FOR AND IN BEHALF OF HIMSELF AND ALL OTHER EMPLOYEES OF THE DEFENDANT SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

CHRIS PEDERSEN, individually and as agent and representative for and in behalf of himself and all other employees of the defendant similarly situated, Respondent,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Appellant

STATEMENT UNDER RULE 234

June 15, 1939—Action commenced.

Aug. 10, 1939—Issue joined by service of answer.

Dec. 29, 1939—Trial before Mr. Justice Bergan on stipulated facts.

Mar. 18, 1940—Judgment entered dismissing complaint (173 Misc. 188).

Mar. 23, 1940—Appeal by plaintiff to Appellate Division.

Nov. 12, 1941—Judgment affirmed by Appellate Division (262 App. Div. 665).

[fol. 2] Nov. 15, 1941—Order and judgment of affirmance entered in Columbia County Clerk's office.

Dec. 11, 1941—Appeal by plaintiff to Court of Appeals.

June 18, 1942—Court of Appeals unanimously affirmed judgment of Appellate Division (288 N. Y. 687).

June 20, 1942—Order and judgment on remittitur of Court of Appeals entered in Columbia County Clerk's office.

Sept. 14, 1942—Plaintiff filed petition for writ of certiorari in United States Supreme Court.

Feb. 8, 1943—Petition for writ of certiorari granted and judgment reversed.

Mar. 3, 1943—Defendant filed petition for rehearing in United States Supreme Court.

Mar. 8, 1943—Judgment amended by United States Supreme Court.

Mar. 18, 1943—Mandate of United States Supreme Court issued.

Apr. 20, 1943—Order and judgment on mandate entered in Columbia County Clerk's office.

May 3, 1943—Defendant served notice of motion for judgment dismissing complaint.

May 4, 1943—Plaintiff served notice of motion for summary judgment.

May 21, 1943—Motions returnable before Mr. Justice Foster at Special Term.

June 8, 1943—Decision of Special Term on motions.

[fol. 3] June 16, 1943—Order and judgment entered granting plaintiff's motion for summary judgment.

June 18, 1943—Order entered denying defendant's motion for judgment dismissing complaint.

There has been no change in parties or attorneys, except Wilson & Connor, Esqs., were substituted as attorneys for plaintiff on April 27, 1941, and by an order made September 8, 1939, one individual was dropped as a co-plaintiff and thirteen others were added as co-plaintiffs.

[fol. 4] In Supreme Court of New York, Columbia County

[Title omitted]

Notice of Appeal to Appellate Division

Sirs:

Please Take Notice, that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the order herein entered in Columbia County Clerk's office on June 16, 1943, granting plaintiff's motion for summary judgment, striking out the answer of the defendant and directing judgment in favor of plaintiff against defendant with interest, costs and attorney's fees, and defendant also appeals to said Appellate Division from the judgment herein entered in the same Clerk's office on June 16, 1943, whereby plaintiff recovered judgment against the defendant in the sum of Twelve Thousand Five Hundred Sixty-eight Dollars and Thirty-five Cents ($12,568.35) and defendant appeals from each and every part of said order and judgment upon both the law and the facts, and

[fol. 5] Please Take Further Notice, that the said defendant hereby appeals to said Appellate Division from the order herein entered in Columbia County Clerk's office on June 18, 1943, denying defendant's motion for a dismissal of the complaint.

Dated: June 21, 1943.

Yours, etc., Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

To Wilson & Connor, Attorneys for Plaintiff. Columbia County Clerk.

[fol. 6] **Former Record on Appeal**

IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

CHRIS PEDERSEN, individually and as agent and representative for and in behalf of himself and all other employees of the defendant similarly situated, Plaintiff,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Defendant

NOTICE OF APPEAL FROM ORIGINAL JUDGMENT TO APPELLATE DIVISION

SIRS:

Please Take Notice that plaintiff Chris Pedersen, individually and as Agent and Representative, etc., appeals to the Appellate Division of the Supreme Court, 3rd Department, from a final judgment dated March 18, 1940, and entered in the Columbia County Clerk's office March 18, 1940 dismissing plaintiff's complaint herein on the merits with costs and from each and every part of the said judgment from the whole thereof.

Dated, Albany, N. Y., March 23, 1940.

Ransom H. Gillett, Office & P. O. Address, 19 D. & H. Building, Albany, N. Y.

To Grant A. Miller, Columbia County Clerk, Hudson, N. Y. Whalen, Creble, McNamee & Nichols, Attorneys for Defendant, 75 State Street, Albany, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, COUNTY OF COLUMBIA

[Title omitted]

SUMMONS

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice

of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Columbia.

Dated, June 14, 1939.

Ransom H. Gillett, Attorney for Plaintiff, Office and Post Office Address, 19, D. & H. Building, Albany, New York.

[fol. 8] In Supreme Court of New York, Columbia County

Complaint

Plaintiff complains against defendant and alleges:

1. Plaintiff is a resident of the Village of Kinderhook, Columbia County, New York, and has been duly designated, pursuant to Section 16, Ch. 676 of the Act of Congress of June 25, 1938, known as the Fair Labor Standards Act of 1938 (29. U. S. C. A.; Sec. 216), as agent and representative of certain employees of Defendant, employed by Defendant in interstate commerce, to maintain this action on their behalf and on behalf of all employees similarly situated pursuant to the provisions of said Act for overtime compensation and for liquidated damages due and payable to them and each of them, as in said Act provided.

2. Annexed hereto and made part hereof is Schedule "A" showing the names and places of residence of those employees of the Defendant who are similarly situated as Plaintiff and who have designated Plaintiff as their agent and representative to maintain this action for and on their behalf as is in said Act provided; and showing the number of hours of overtime each of the employees named in Schedule "A" claims to have worked for Defendant in interstate commerce (as more fully and at large hereinafter appears), the hourly rate of pay of each said employees, and the total amount claimed by each of them for overtime compensation and for liquidated damages.

3. At all times hereinafter mentioned, defendant was a foreign corporation duly licensed to do business in this state

[fol. 9] and was engaged as a contractor in the repair of certain bridges erected, maintained and used by the Boston & Albany Railroad in interstate commerce in Columbia County, and plaintiff, together with the employees whom he here represents were employed in interstate commerce by defendant in and about the repair, maintenance and use of said bridges, which were and are used as a means of transportation and communication from New York State to places outside thereof.

4. Such employment was within the terms and provisions of an Act of Congress entitled "Fair Labor Standards Act of 1938," and was not within any of the exceptions in said Act set forth.

5. Plaintiff, his co-plaintiffs and other of defendant's employees similarly situated were so engaged in interstate commerce in work on the said bridges as employees of the defendant from time to time since October 24, 1938.

6. Since October 22, 1938, when the said Fair Labor Standards Act of 1938 became effective, defendant has required and compelled plaintiff and his co-plaintiffs and its other employees similarly situated to work ten hours a day seven day a week with the exception of Thanksgiving Day and Christmas, 1938, and Easter Sunday, 1939, without paying them the overtime to which they were and are entitled pursuant to the provisions of the Act of Congress cited above.

7. Since October 22, 1938, plaintiff, his co-plaintiffs and other of defendant's employees similarly situated whom he [fol. 10] here represents have worked ten hours per day in interstate commerce as aforesaid some for the entire number of elapsed days since the said Act took effect, others for a lesser number of days, depending upon the date of their employment, or their inability to work whilst so employed due to temporary lay-offs, illness or other circumstances or other factors or conditions affecting their individual cases; as more fully and at large appears in Schedule "A" annexed hereto and made part hereof.

8. Since October 22, 1938, plaintiff and his co-plaintiffs and his fellow employees similarly situated whom he here represents have been paid by the hour at different rates of

pay per hour ranging between .45 cents and .85 cents per hour; all as set forth in Schedule "A."

9. Between October 24, 1938, and up to on or about April 1, 1939, plaintiff was paid at the rate of .45 cents per hour. From on or about April 1, 1939, to May 31, 1939, plaintiff was paid at the rate of .60 cents per hour.

10. During the entire period, October 24, 1938, to May 31, 1939, plaintiff worked ten hours a day seven days a week excepting Thanksgiving and Christmas days in 1938 and Easter Sunday, 1939, and three half days preceding those holidays and four days when he was unable to work by reason of sickness.

11. During the period, October 24, 1938, and April 1, 1939, plaintiff worked 154 days for ten hours a day and during the period, April 1, 1939, to May 31, 1939, plaintiff worked 58 days for ten hours a day.

[fol. 11] 12. By reason of these premises and by virtue of the provisions of the Act of Congress above referred to, plaintiff is entitled to recover from defendant overtime pay and compensation earned during the period, October 24, 1938, to April 1, 1939, in amount Ninety-two Dollars and Forty Cents ($92.40); and for the period, April 1, 1939, to May 31, 1939, Forty-six Dollars and Forty Cents ($46.40); in all, the sum of One Hundred Thirty-eight Dollars and Eighty Cents ($138.80), to which plaintiff is entitled as overtime, plus a like sum as liquidated damages, or a total amount of Two Hundred Seventy-seven Dollars and Sixty Cents ($277.60).

13. By reason of the same premises, as applied to each of the employees mentioned in Schedule "A," defendant is indebted to plaintiff's co-plaintiffs and the employees he represents as shown on Schedule "A" annexed and to all its others employees similarly situated in a sum of money equivalent to one-half times their respective hourly rate of pay for the hours each worked in excess of the forty-four hour week prescribed by the Act of Congress above referred to and a like sum as liquidated damages, which sum amounts to Six Thousand Two Hundred Forty-six Dollars and Thirty Cents ($6,246.30), as shown on Schedule "A" hereto annexed.

Wherefore, plaintiff demands judgment against defendant on his own behalf in the sum of Four Hundred Sixty-two Dollars and Forty Cents ($462.40), together with a reasonable attorney's fee, and on behalf of his co-plaintiffs and all other employees of the defendant similarly situated, [fol. 12] such sum as shall be determined to be due each of them on due proof to be presented in this action on their behalf as to the amount of overtime due each of them respectively as shown by Schedule "A" hereto annexed; in all, the sum of Six Thousand Seven Hundred Eight Dollars and Seventy Cents ($6,708.70), plus costs of this action.

Dated: Albany, New York, June 14, 1939.

Ransom H. Gillett, Plaintiff's Attorney, Office & P. O. Address, 19 D. & H Building, Albany, N. Y.

(Duly verified by plaintiff June 15, 1939.)

[fol. 13] SCHEDULE "A" TO COMPLAINT

	Name	Address	Overtime Hours	Rate per Hour Cts.	Due for Overtime	Overtime plus Liquidated Damages
1.	Harry Blake	East Chatham	458-2/3	.50	$114.67	$229.34
2.	James Blake	East Chatham	520	.45	117.00	234.00
3.	Joseph Condon	Chatham	424	.85	180.20	360.40
4.	Hugh Darby	Chatham Center	368	.45	82.80	165.60
5.	Owen Francis	Chatham	122-2/3	.45	27.60	55.20
6.	John H. Grimes	Chatham Center	528	.45	118.80	237.60
7.	William Gray	Chatham	488	.45	109.80	219.60
8.	Bishop Hooser	Chatham Center	474-2/3	.55	130.53	261.06
9.	Fred Houston	Niverville	306-2/3	.45	69.00	138.00
10.	Francis Harris	Chatham Center	578-2/3	.45	130.20	260.40
11.	Peter Kirsebam	Stuyvesant Falls	578-2/3	.85	245.93	491.86
12.	Sanford Kittle	Chatham	498-2/3	.45	112.20	224.40
13.	Irving C. Kittle	Chatham Center	285-1/3	.45	64.20	128.40
14.	Soren Lauridsen	Kinderhook	523-2/3	.45	117.60	235.20
15.	Charles Minneci	Old Chatham	106-2/3	.45	24.00	48.00
16-a.	Robert Nichols	Chatham	42-2/3	.45	9.60	19.20
16-b.	" "	"	304	.60	91.20	182.40
16-c.	" "	"	192	.70	67.20	134.40
17.	Merton Oles	Chatham	101-2/3	.45	22.80	45.60
18.	Webster Pulver	Chatham Center	528	.45	118.80	237.60
19.	Harry Peterson	Chatham	133-1/3	.45	30.00	60.00
20.	Donald Paterson	Chatham	578-2/3	.85	245.93	491.86
21.	Gerald Shay	Chatham Center	578-2/3	.45	130.20	260.40
22.	Wilford Sheldon	Chatham	437-1/3	.45	98.40	196.80
23.	Robert Sheldon	Chatham	538-2/3	.45	121.20	242.40
24-a.	Theodore Stalker	Chatham	68-2/3	.45	15.45	30.90
24-b.	" "	"	226-2/3	.50	56.67	113.34
24-c.	" "	"	152	.60	45.60	91.20
25.	Alfred Smith	Chatham	472	.45	106.20	212.40
26.	Andrew Van Alstyne	Chatham Center	410-2/3	.45	92.40	184.80
27-a.	Harry Voss	Kinderhook	300	.75	112.50	225.00
27-b.	" "	"	152	.85	64.60	129.20
28.	Angelo Yocco	Chatham	117-1/3	.85	49.87	99.74
					3,123.15	6,246.30

[fol. 14] In Supreme Court of New York, Columbia County

Answer

Defendant, answering the complaint herein:

First. Denies that it has knowledge or information sufficient to form a belief as to the allegations, or any of them, contained in the paragraphs of the complaint designated "1" and "2."

Second. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the complaint designated "3," except defendants admits that at all times in the complaint mentioned, it was and now is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and duly licensed to do business in the State of New York.

Third. Denies, upon information and belief, the allegations, and each of them, contained in the paragraphs of the complaint designated respectively "4," "5," "6," "7," "10," "11," "12" and "13."

Fourth. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the complaint designated "8," except defendant admits that at various times since October 22, 1938, plaintiff and the persons mentioned in Schedule "A" annexed to the complaint have been paid by the hour at different rates of pay per hour ranging between forty-five cents and eighty-five cents per hour.

Fifth. Denies, upon information and belief, the allegations, and each of them, contained in the paragraph of the [fol. 15] complaint designated "9," except defendant admits that between October 24, 1938, and up to on or about April 1, 1939, plaintiff was paid at the rate of forty-five cents per hour.

Wherefore, defendant demands judgment dismissing the complaint herein with costs.

Whalen, McNamee, Creble & Nichols; Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

(Duly verified by defendant August 10, 1939.)

[fol. 16] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

Agreed Statement of Facts

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the above action be submitted to the Court for determination at a term thereof, commencing on November 13, 1939, at the County Court House in the City of Hudson, N. Y., upon the summons, complaint, answer and order herein granted at a Special Term of this Court held at Albany, N. Y., on September 8, 1939, and entered in Columbia County Clerk's Office September 19, 1939, and the following agreed statement of facts in lieu of proof, subject, however, to the right of either party to review such determination and any judgment which may be entered thereon by appeal or other proper remedy in any Appellate Court:

STATEMENT OF FACTS

1. The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham, Columbia County, New York.

2. In September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

3. Thereafter, the railroad company entered into a contract with the defendant, an independent contractor engaged in general construction work, for the construction [fol. 17] of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

4. The construction of the new abutments by the defendant constituted about two-thirds of the total work performed by the defendant under said contract, and the repairs to the substructures of the other two bridges constituted the remainder of said work.

5. Some of the material used by the defendant in performing its work under said contract came from without the State of New York before being used by the defendant in the work performed by it under said contract.

6. Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule "A" annexed hereto.

7. The tracks of the railroad were carried on the superstructures of all of said bridges while the said new abutments were being built at two of said bridges, and while said repairs were being made to the substructures of the other two bridges, but said new abutments were not used to support the superstructures of said two bridges nor the railroad roadbed, nor by the railroad company in any way at any time while defendant was engaged in the performance of the work under said contract.

8. After all of the work performed by defendant under said contract had been completed, the railroad company in- [fol. 18] spected and accepted the same, and thereafter, the railroad lowered the superstructures of the two bridges upon said new abutments and all of said bridges have been used by the railroad ever since over which it has operated trains between the States of New York and Massachusetts.

9. The federal statute, known as the Fair Labor Standards Act of 1938, was adopted by Congress and approved by the President four months prior to October 24, 1938.

10. After October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule "A" annexed hereto.

11. The total number of hours worked by each plaintiff in excess of forty-four (44) hours per week is shown on Schedule "B" annexed hereto, together with the amount of money claimed by each plaintiff to be due him, 50% of which represents wages at one-half the hourly rate for the total number of hours worked by each plaintiff in excess of 44 hours per week, and the remaining 50% of which represents an equivalent amount claimed by each plaintiff

as liquidated damages pursuant to the provisions of said statute.

Dated: December 1, 1939.

Ransom H. Gillett, Plaintiff's Attorney. Whalen, McNamee, Creble & Nichols, Defendant's Attorneys.

[fol. 19] NOTE RE SCHEDULE "A" TO AGREED STATEMENT OF FACTS

Pursuant to Rule 232 R. C. P. Schedule A referred to in the Agreed Statement of Fact is not printed at length for the reason that the matters therein set forth are not deemed necessary to the proper determination of this appeal.

SCHEDULE "B" TO AGREED STATEMENT OF FACTS

Overtime hours and wages claimed by the following plaintiffs as shown by time sheets furnished by defendant, dated October 19, 1939.

Name	Overtime Hours	Amount Claimed for Overtime & Damages
1. Chris Pedersen	533	$261.78
2. Harry Blake	429.5	213.56
3. Joseph Condon	550.5	455.20
4. James Blake	534	240.30
5. Hugh Darby	416	187.20
6. Owen Francis	146	65.70
7. John H. Grimes	336	151.20
8. William Gray	233.5	105.06
9. Bishop Hooser	653	349.50
10. Fred Huston	284.5	128.02
11. Francis Harris	113.5	51.07
12. Peter Kirsebaum	728	586.90
13. Sanford Kittle	260	117.00
14. Irving C. Kittle	142.5	64.12
15. Soren Lauridsen	604	271.80
16. Charles Minneci	150.5	67.72

[fol. 20]

Name	Overtime Hours	Amount Claimed for Overtime & Damges
18. Merton Oles	121	54.46
19. Webster Pulver	394.5	177.53
20. Harry Peterson	111.5	50.18
21. Donald Paterson	680.5	578.42
22. Gerald Shay	435	200.34
23. Wilford Sheldon	225.5	101.48
24. Robert Sheldon	702	315.90
25. Theodore Stalker	586	294.76
26. Alfred Smith	431.5	198.82
27. Andrew VanAlstyne, Sr.	473	212.86
28. Harry Voss	255	214.68
29. John F. Sheldon	233	104.86
30. Joseph LaPlaca	115.5	51.98
31. Edward LaPlaca	53	23.86
32. Harry Middlebrook	251	112.96
33. Knute Odegaard	126	73.60
34. William M. Herrick	189	85.06
35. Frank C. Hatch	59.5	26.78
36. Calvin Thompson	146.5	65.92
37. Charles H. Barton	162.5	121.88
38. Frederick Beaman	246	110.70
39. Carmon S. Navarro	365	310.26
40. Charles F. McGill	54	24.30
		$7,186.72

[fol. 21] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

OPINION

BERGAN, J.:

The first problem presented is whether plaintiff, in the stipulated facts under which he was employed by defendant, was "engaged in the production of goods for commerce" within the scope of Fair Labor Standards Act of 1938, Section 7 (a). The definition of the word "goods" is quite inclusive (Sec. 3 [i]). It is conditioned, in the sense used in Section 7 (a), however, by the word "commerce," and in

turn, by the statutory definition of that word in Section 3 (b). That definition is that commerce is "trade, commerce, transportation, transmission or communication among the several states * * *." This statutory definition is in general harmony with the commonly accepted sense of the word in current usage.

The construction of new abutments under two bridges, and the repair of the substructures under two other bridges, was not, I think, the "production of goods for commerce." Broadly as the statutory definition may be viewed, the abutments and the substructures of the four bridges cannot be treated as goods, wares, products, commodities or merchandise and certainly were not "articles or subjects of commerce." They were never themselves to be the subjects of trade or commerce or transportation, or transmission or communication among the several states. The plain intent of the statute and the common and usual sense in which the words employed and their definition in the statute are to be construed excludes from the phrase "production of [fol. 22] goods for commerce" the construction of the permanent, stationary abutments and substructures of bridges here stipulated.

The terms used are not, indeed, static concepts; they have been made elastic to meet legislative views of the necessities of changing national conditions. But I have seen no authoritative extension of definition beyond common understanding and usage in the scope here urged by the plaintiff, and I conclude that plaintiff, under the facts stipulated, was not engaged in the production of goods for commerce.

The question remaining for determination is whether plaintiff was, within Section 7 (a), "engaged in commerce," which means, of course, "among the several states." This question is more debatable than the first one considered, but the answer, too, must be given in the negative.

The railroad company for which defendant was retained is engaged in interstate commerce.

The bridges for which the abutments and substructures were built were subsequently to be used by the railroad in such commerce. The stipulation concedes that the new abutments, while being built by defendant, did not carry the tracks of the railroad, but that the bridges under which the substructures were being repaired did carry the tracks of the railroad during such operation.

Since there is no attempt in the stipulated facts to segregate the overtime hours attributed to the abutment operations from those attributed to the substructure operations, and since about two-thirds of the total work was comprised of building the abutments, the overtime work [fol. 23] may be more readily attributed to the abutments than to the substructures. Indeed, for all that appears, all of it may be attributed to the former, but in any event the result reached will be the same.

The nature of this work performed by the defendant, not itself engaged in interstate commerce, cannot be treated as such commerce. The business which it performed upon these bridges was local in character and was wholly separated from interstate commerce (Browning v. Waycross, 233 U. S. 16, 22). The defendant, and hence the plaintiff, too, seem to be engaged in the kind of undertaking for a railroad in which the signal company was engaged in General Railway Signal Co. v. Virginia *ex rel.* Corporation Commission (246 U. S. 500). It is no answer to say that this was a tax case. The principle was stated, and it is the same, however the controversy arose. "We think," Mr. Justice McReynolds said (p. 510), "the recited facts clearly show local business separate and distinct from interstate commerce within the doctrine of Browning v. Waycross."

Whatever might be said of the situation that would result if the plaintiff were employed by the railroad company itself in repairing the substructures of the bridges it was actually using in interstate commerce, it would seem that the construction of the abutments, prior to their actual and physical use in interstate commerce, even by the railroad itself, would not result in the engagement of plaintiff in interstate commerce. So it was held in respect of a tunnel, partially bored "and hence not in use as an instrumentality of interstate commerce" (Raymond v. Chicago, Mil- [fol. 24] waukee & St. Paul Rwy., 243 U. S. 43, 44).

Where the railroad engaged in interstate commerce itself repaired a bridge being used as an instrumentality of such commerce, an employee engaged in such an operation is engaged in interstate commerce (Pedersen v. Delaware, Lackawanna & Western R. R., 229 U. S. 146). But this was upon the theory as the court pointed out (p. 151) that the work was not being done independently of the interstate commerce in which the railroad was engaged, but was so

closely connected with it as to be a part of it. No such theory applies to the work of this defendant which was not engaged in interstate commerce at all.

Judgment for defendant dismissing the complaint upon the merits.

Submit decision and judgment on or before February 2, 1940.

[fol. 25] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

Decision—March 2, 1940

Present: Honorable Francis Bergan, Justice.

The above-entitled action having regularly come on to be tried before the Court without a jury at this term of Court and having been duly submitted to the Court on December 29, 1939, pursuant to Stipulation of the attorneys for the respective parties, dated December 1, 1939, and upon the pleadings and allegations of the respective parties and the agreed statement of facts as contained in said stipulation of December 1, 1939, in lieu of proof, and after hearing Ransom H. Gillett, Esq., attorney for the plaintiff, and Whalen, McNamee, Creble & Nichols, attorneys for the defendant; I find and decide as follows:

FINDINGS OF FACT

1. That The New York Central Railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right-of-way in the Town of Chatham, Columbia County, New York.

2. That in September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

3. That thereafter, the railroad company entered into a contract with the defendant, an independent contractor en- [fol. 26] gaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as

aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

4. That the construction of the new abutments by the defendant constituted about two-thirds of the total work performed by the defendant under said contract, and the repairs to the substructures of the other two bridges constituted the remainder of said work.

5. That some of the material used by the defendant in performing its work under said contract came from without the State of New York before being used by the defendant in the work performed by it under said contract.

6. That defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule "A" annexed to said stipulation of December 1, 1939.

7. That the tracks of the railroad were carried on the superstructures of all of said bridges while the said new abutments were being built at two of said bridges, and while said repairs were being made to the substructures of the other two bridges, but said new abutments were not used to support the superstructures of said two bridges nor the railroad roadbed, nor by the railroad company in any way at any time while defendant was engaged in the performance of the work under said contract.

[fol. 27] 8. That after all of the work performed by defendant under said contract had been completed, the railroad company inspected and accepted the same, and thereafter, the railroad lowered the superstructures of the two bridges upon said new abutments and all of said bridges have been used by the railroad ever since over which it has operated trains between the States of New York and Massachusetts.

9. That the Federal statute, known as the Fair Labor Standards Act of 1938, was adopted by Congress and approved by the President four months prior to October 24, 1938.

10. That after October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as

shown on Schedule "A" annexed to said stipulation of December 1, 1939.

11. That the total number of hours worked by each plaintiff in excess of forty-four (44) hours per week is shown on Schedule "B" annexed to said stipulation of December 1, 1939, together with the amount of money claimed at one-half the hourly rate for the total number of hours worked by each plaintiff in excess of 44 hours per week, and the remaining 50% of which represents an equivalent amount claimed by each plaintiff as liquidated damages, pursuant to the provisions of said statute.

[fol. 28] CONCLUSIONS OF LAW

First. That the term "commerce" as used in said Federal Fair Labor Standards Act of 1938, hereinafter referred to as the "Act" means and applies only to trade, commerce, transportation, transmission or communication among the several states, or from any state to any place outside thereof.

Second. That neither plaintiff nor any of the employees of the defendant referred to in the findings of fact herein as the plaintiffs in performing work referred to in the findings of fact herein, was engaged in the production of goods for commerce within the scope, meaning or application of said Act.

Third. That neither plaintiff nor any of said employees of the defendant in performing work referred to in the findings of fact herein, was engaged in commerce within the scope, meaning or application of said Act.

Fourth. That neither plaintiff nor any of said employees of the defendant is entitled to any of the relief which he seeks herein.

Fifth. That the complaint herein should be, and it hereby is, dismissed upon the merits, with costs to the defendant, and that judgment be entered accordingly.

Dated: March 2, 1940.

Francis Bergan, Justice Supreme Court.

[fol. 29] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT—March 18, 1940

The above-entitled action having been duly submitted to the Court for determination without a jury at a Term thereof commencing on November 13, 1939, and the Court having made findings of fact and conclusions of law, as contained in its decision in writing which has this day been filed in the office of the Clerk of Columbia County, by which decision the Court has directed that judgment be entered dismissing the complaint upon the merits with costs to the defendant,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the complaint herein be, and it hereby is, dismissed upon the merits, and that the defendant recover of the plaintiff its costs as taxed in the sum of Two Hundred Eighteen and 50/100 Dollars ($218.50) and that execution issued accordingly.

Dated: March 18th, 1940.

Grant A. Miller, Clerk, by Harold I Hall, Deputy.

[fol. 30] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

CHRIS PEDERSEN, Individually and as Agent and Representative for and in Behalf of Himself and All Other Employees of the Defendant Similarly Situated, Appellant,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, Respondent

ORDER OF AFFIRMANCE—November 14, 1941

The appeal taken by the above appellant from a judgment herein entered in Columbia County Clerk's office on March 18, 1940, having been argued at this term of Court on behalf of the appellant by William E. J. Connor, Esq., of [fol. 31] counsel for the appellant, and by Henry E. Foley,

Esq., of counsel for Whalen, McNamee, Creble & Nichols, attorneys for the respondent, and after due deliberation this Court having handed down its decision herein on November 12, 1941,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the respondent, it is, with Presiding Justice Hill and Justice Bliss dissenting.

Ordered that said judgment so appealed from be, and the same hereby is, affirmed with costs to the respondent.

John S. Herrick, Clerk.

A true copy. John S. Herrick, Clerk.

Entered in Columbia County Clerk's office November 15, 1941.

[fol. 32] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

[Title omitted]

JUDGMENT OF AFFIRMANCE—November 15, 1941

The above named plaintiff having appealed to the Appellate Division of the Supreme Court, Third Department, from the judgment in the above entitled action duly entered in the office of the Clerk of the County of Columbia on March 18, 1940, and said Appellate Division, by its order entered in the office of the Clerk thereof on November 14, 1941, a certified copy of which, together with the original record on appeal, has been this day filed in the office of said County Clerk, having affirmed with costs to the defendant against the plaintiff said judgment so appealed from, and said defendant's costs having been duly taxed at the sum hereinafter stated,

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged that said judgment entered in the office of the Clerk of the County of Columbia on March 18, 1940, be, and the same hereby is, affirmed and that the defendant recover of the plaintiff the sum of $102.55, its costs, and that execution issue accordingly.

Dated: November 15, 1941.

Grant A. Miller, Clerk, by Harold I. Hall, Deputy.

Entered in Columbia County Clerk's office November 15, 1941.

[fol. 34] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

DECISION—November 12, 1941

Judgment dismissing the complaint affirmed with costs. Opinion by Schenck, J.

Crapser and Foster, JJ., concur.

Bliss, J., dissents and votes to reverse, with an opinion in which Hill, P. J., concurs.

[fol. 35] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

OPINION FOR AFFIRMANCE

SCHENCK, J.:

Two questions are here presented: (a) Were the several persons represented by plaintiff engaged in interstate commerce; (b) Were these several persons, hereinafter referred to as plaintiffs, engaged in the production of goods for commerce.

The appeal here is taken from a judgment dismissing the complaint upon the merits in an action brought by plaintiff Pedersen, individually, and as representative of certain other former employees of defendant to recover overtime wages and an equivalent amount as liquidated damages pursuant to the provisions of Sections 7 and 16 of the Federal Fair Labor Standards Act of 1938. The action was submitted to the Court below upon an agreed statement of facts. As lessee of the Boston and Albany Railroad, the New York Central Railroad Company operated trains between New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham. In September, 1938, the abutments of two of said bridges were completely destroyed by flood, and the superstructures of the other two bridges were damaged. The defendant is an independent contractor engaged in general construction work. He entered into a contract with the railroad company for the construction of new abutments

under the two bridges destroyed and for the repairing of the superstructures of the two damaged bridges. Plaintiffs were employed by defendant on this work. During the [fol. 36] erection of the new abutments and the completion of the repairs to the superstructures of the other bridges, the tracks of the railroad were carried on the superstructures of all of the four bridges, but the said new abutments were not used to support such superstructures nor the railroad bed, nor were said abutments used by the railroad company in any way during the course of the work being performed by defendant under his said contract.

While the railroad company was obviously engaged in interstate commerce the defendant was an independent contractor employed by the railroad to perform work clearly local in its character and separate and distinct from such commerce. (*Browning v. Waycross*, 233 U. S. 16, 22.) Plaintiffs were at no time employed by the railroad company. We have no such situation as found in *Pedersen v. Delaware, Lackawanna & Western R. R.*, 229 U. S. 146, for there the work was being prosecuted by a railroad engaged in interstate commerce and the work was so clearly connected with it as to be a part thereof. Here, the defendant was not engaged in interstate commerce and was simply performing local construction work which was neither an interstate occupation nor commerce. (*General Railroad Signal Co. Virginia ex rel. Corporation Commission*, 246 U. S. 500.) Interstate commerce means interstate commercial intercourse, and while defendant, pursuant to its contract, was engaged in work upon an instrumentality of interstate commerce, the performance of such work does not constitute such commerce. (*McKee v. Ohio Electric Railway Co.*, West Virginia Supreme Court of Appeals, 88 S. E. 616.)

[fol. 37] The remaining question as to whether or not plaintiffs were engaged in the production of goods for commerce must necessarily be answered in the negative. The construction of new abutments and the making of repairs to the superstructures of the railroad bridges did not constitute "the production of goods for commerce" within the meaning of the act. From the definition of the term "goods" as found in the act, no inference may be drawn that these plaintiffs were engaged in the production of goods, products or commodities for commerce. Plaintiffs were not employed in producing, manufacturing, mining, handling

or in any other manner working on goods for commerce, nor performing any act of production as contemplated by Section 3 of the act. In performing work upon these abutments and superstructures, plaintiff were not engaged in work upon a subject of commerce, but, at best, upon an instrumentality of commerce. They were engaged in the construction of bridge abutments and the repair of bridge superstructures and were not functioning in the production of goods destined for interstate shipment. (*Fleming v. Arsenal Building Corporation, et al.*, 38 F. S. 207; *Killingbeck v. Garment Center Capitol, Inc.*, 259 App. Div. 691.) Nor were these plaintiffs employees of a manufacturer engaged in the production of goods for commerce. The defendant here was merely a contractor engaged in local construction and repair work for the railroad corporation.

The judgment dismissing the complaint upon the merits should be affirmed, with costs.

[fol. 38] DISSENTING OPINION

351/22.

BLISS, J. (dissenting):

This action is brought by the plaintiff in behalf of himself and thirty-three other employees of the defendant to recover pay and a half for overtime worked by them in excess of the forty-four hour week prescribed by the United States Fair Labor Standards Act of 1938 (29 U. S. C. A. § 216), together with liquidated damages under the act.

The facts are stipulated. Defendant had a contract with the New York Central Railroad Company as lessee of the Boston and Albany Railroad Company for the construction of new abutments under two railroad bridges and repairing the superstructures of two other bridges. These abutments had been completely washed out and destroyed and the substructures of the other bridges had been damaged by the flood of September, 1938. The construction of the new abutments constituted about two-thirds of the total work performed by the defendant under this contract and the repairs of the superstructures of the other two bridges constituted the remainder of the work. The Boston and Albany Railroad operated trains between New York and Massachusetts over these four bridges and its tracks were carried on the superstructures of all of the bridges while

the new abutments were being built at two of the bridges and the repairs were being made to the substructures of the other two, but the new abutments were not used to support the superstructures of the two bridges, nor the railroad roadbed, nor by the railroad company in any way at any [fol. 39] time while defendant was engaged in any performance of the work under the contract. After all of the work under the contract had been completed the railroad company inspected and accepted it and thereafter the railroad lowered the superstructures of the two bridges upon the new abutments and all of the bridges have been used by the railroad ever since and over which it has operated trains between New York and Massachusetts. In the performance of the work under the contract the plaintiff and the workmen whom he represents, worked overtime in excess of forty-four hours per week. Apparently they were paid for this overtime at their regular hourly rate instead of the pay and a half for overtime claimed by them.

The plaintiffs base their claim upon the Federal Fair Labor Standards Act of 1938 (U. S. C. A. Title 29, ch. 8). Sec. 206 of this act provides that every employer "shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce, wages at" certain rates. Sec. 207 provides that no employer shall, with certain exceptions not applicable here, "employ any of his employees who are engaged in commerce or in the production of goods for commerce" for a work week longer than forty-four hours during the first year from the effective date of the statute unless such employee receives compensation for his employment in excess of these hours at a rate not less than one and one-half times the regular rate at which he is employed. The term "commerce" as used in this statute is defined to include transportation, transmission or communication among the several states (Sec. 203), or [fol. 40] what would be commonly termed "interstate commerce." This case thus crystalizes upon a determination as to whether or not these employees were engaged in transportation among the several states, which is interstate commerce, for it is obvious that they were not engaged in the production of goods for interstate commerce.

That the railroad with which the defendant had its contract was engaged in interstate is not and cannot be questioned. Likewise it is now no longer open to doubt that the

construction of new bridges which may be later dedicated to use in interstate commerce is not in itself interstate commerce. Such constructions is said to be local in its operations and not interstate. *(Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43; *Gen. Ry. Signal Co. v. Comm. of Va.*, 246 U. S. 500; *McKee v. Ohio Valley Electric Ry. Co.*, 88 S. E. [W. Va.] 616.)

The case of *Pedersen v. D. L. & W. R. R. Co.* (229 U. S. 146), seems to be controlling here. It was there held that the work of keeping a railroad bridge in repair while used by a railroad in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The Court said:

"That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged or was it so closely connected therewith [fol. 41] as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the

business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (See *McCall v. California*, 136 U. S. 104, 109, 111, 34 L. ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases [*Mondou v. New York*, [fol. 42] *N. H and H. R. Co.*], 223 U. S. 6, 59, 56 L. ed. 329, 350, 38 L. R. A. [N. S.] 44, 32 Sup. Ct. Rep. 169; *Zikes v. Oregon R. & Nav. Co.*, 179 Fed. 893, 897, 898; *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901; *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665; *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.) Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The bridges which were being repaired by the plaintiff had already been dedicated to and used in interstate commerce. They had become instrumentalities of such commerce. Keeping them in a usable condition was necessary to the interstate commerce in which the railroad was engaged. When portions of them were destroyed or no longer usable, it was necessary to replace them with new parts and the installation of these new parts cannot be put in the same class as the building of a wholly new structure. We conclude, therefore, that the installation of these new abutments and repairs to the substructures were acts which so closely related to the interstate commerce in which the structures were already being used as to be a part of it.

The Fair Labor Standards Act makes the employee's duties the test as to whether the act applies. The fact that the railroad had entered into a contract for the repair of these bridges with an independent contractor does not deprive workmen engaged in the work of the benefits of the [fol. 43] act. (*State v. Bates & Rogers Const. Co.*, 91 Wash. 181; 157 Pac. 482.) If this were not so, it would be possible for a railroad engaged in interstate commerce to thus contract with an independent contractor for the performance of many other of its operations in interstate commerce and thus avoid federal jurisdiction over such operations. As was stated in the *Pedersen* case and quoted above: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is

engaged?'' The conclusion here seems irresistible that the workmen who were repairing these four railroad bridges were actually participating in the interstate business of the railroad. If these workmen were employed by the railroad itself there would be no question but what they were engaged in interstate commerce, because they were repairing structures already being used in such commerce and such work was so closely connected with the interstate commerce of the railroad as to be a part of it. The intrinsic nature and indispensable character of such work to interstate transportation were not altered by the interposition of the fact that such work was being performed through an independent contractor. It was still as much a part of and necessary to interstate commerce as it would have been if the railroad were doing the work itself. If we are correct in this conclusion, then clearly the men who were repairing the bridges came within the provisions of the Federal Fair Labor Standards Act as they were engaged in interstate commerce.

The judgment should be reversed on the law and facts, with costs, and judgment directed for the plaintiff.

[fol. 44] IN THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—November 27, 1941

SIRS:

Please Take Notice that the above named plaintiff-appellant hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the clerk of the County of Columbia on the 15th day of November, 1941, pursuant to the order of the Appellate Division of the Third Judicial Department, duly entered herein, which judgment affirmed the judgment of the Supreme Court of the County of Columbia, entered herein on the 18th day of March, 1940.

Dated: November 27, 1941.

Wilson & Connor, Attorneys for Plaintiff-Appellant,
Office and Post Office Address, 609 Warren Street,
Hudson, New York.

To: Whalen, McNamee, Creble & Nichols, Esqs., Attorneys for Defendant-Respondent, 75 State Street, Albany, New York. Grant A, Miller, Esq., Clerk of the County of Columbia, Hudson, New York.

(End of Former Record on Appeal)

[fol. 45] IN SUPREME COURT OF NEW YORK

ORDER ON REMITTITUR—June 19, 1942

At a Special Term of the Supreme Court Held in and for the County of Albany, at the Court House in the City of Albany on the 19th day of June, 1942.

Present: Hon. Riley H. Heath, Justice.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 15, 1941, in the office of the Clerk of the County of Columbia, which judgment affirmed the judgment herein, dismissing the complaint entered in the office of the Clerk of said County on March 18, 1940, and said appeal having been duly argued in said Court of Appeals and, after due deliberation, said Court of Appeals having ordered and adjudged that the said judgment so appealed from, as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Riley H. Heath, Justice Supreme Court.

Enter in Columbia County.

[fol. 46] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT ON REMITTITUR—June 20, 1942

A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 15, 1941, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein dismissing the complaint, entered in the office of the Clerk of Columbia County on March 18, 1940, and the above named plaintiff having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the defendant having been duly taxed at the sum of One Hundred Forty-one Dollars ($141.00),

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the Appellate Division be, and the same hereby is, in all things, affirmed, and that the defendant recover of the plaintiff the sum of One Hundred Forty-one Dollars ($141.00), its costs as taxed, and that execution issue accordingly.

Dated: June 20, 1942.

Grant A. Miller, Clerk.

[fol. 47] MANDATE OF UNITED STATES SUPREME COURT—March 18, 1943

UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the Supreme Court of the State of New York, Columbia County, Greeting:

Whereas, lately in the Supreme Court of the State of New York, Columbia County, before you, or some of you, in a cause between Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all other Employees of the Defendant Similarly Situated, Plaintiff, and J. F. Fitzgerald Construction Company, Defendant, wherein the judgment of the said Supreme Court entered in said cause on the 20th day of June, A. D., 1942, on the remittitur from the Court of Appeals, is in the following words, viz:

"A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 15, 1941, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein dismissing the complaint, entered in the office of the Clerk of Columbia County on March 18, 1940, and the above named plaintiff having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judg-[fol. 48] ment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the defendant having been duly taxed at the sum of One Hundred Forty-one Dollars ($141.00),

Now, on motion of Whalen, McNamee, Creble & Nichols, attorneys for the defendant, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the

Appellate Division be, and the same hereby is, in all things, affirmed, and that the defendant recover of the plaintiff the sum of One Hundred Forty-one Dollars ($141.00), as costs as taxed, and that execution issue accordingly."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided fully and at large appears.

And Whereas, in the present term of October in the year of our Lord one thousand nine hundred and forty-two, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was duly submitted:

On consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs [fol. 49] on the authority of Overstreet v. North Shore Corporation, 284, decided February 1, 1943.

And it is further ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

February 8, 1943

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding.

Witness the Honorable Harlan F. Stone, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand nine hundred and forty-three.

Costs of plaintiff
Clerk $59.30
Attorney $20.00

$79.30

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 50] IN SUPREME COURT OF NEW YORK

ORDER ON MANDATE—April 20, 1943

At a Trial Term of the Supreme Court held in and for the County of Albany, at the Court House in the City of Albany, on the 20th day of April, 1943.

Present: Hon. Harry E. Schirick, Justice.

[Same Title]

A judgment dismissing the complaint of the plaintiff herein having been duly entered in the office of the clerk of the County of Columbia on the 18th day of March, 1940, and the said judgment dismissing the complaint of the plaintiff having been affirmed by the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, and a judgment against the plaintiff having been entered on the 15th day of November, 1941, in the office of the clerk of the county of Columbia upon an order of the Appellate Division of the Supreme Court affirming the judgment of the Supreme Court of the State of New York, and a judgment having been entered in the office of the clerk of the county of Columbia on the 20th day of June, 1942, affirming the judgment and order of the Appellate Division, Third Department, and the above named plaintiff having appealed to the United States Supreme Court from the judgment of the Court of Appeals as remitted to the Supreme Court of the State of New York and from the judgment and order upon remittitur from the Court of Appeals by the Supreme Court of the

State of New York, and the said United States Supreme [fol. 51] Court having sent to this Court its mandate wherein and whereby it was provided as follows:

"It is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs

"And it is Further Ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

"And it is Further Ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

"And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding."

Now, on reading and filing the mandate from the United States Supreme Court herein, and on motion of Wilson & Connor, Esqs., attorneys for the plaintiff,

[fol. 52] It is Ordered that said order and judgment and mandate of the United States Supreme Court be, and the same hereby are, made the judgment of this Court.

Harry E. Schirick, Justice Supreme Court.

Enter in Columbia County.

In Supreme Court of New York, Columbia County.

Judgment on Mandate—April 20, 1943

A judgment dismissing the complaint of the plaintiff herein having been duly entered in the office of the clerk of the county of Columbia on the 18th day of March, 1940, and said judgment dismissing the complaint of the plaintiff

having been affirmed by the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, and a judgment against the plaintiff having been entered on the 15th day of November, 1941, in the office of the clerk of the county of Columbia upon an order of the Appellate Division of the Supreme Court affirming the judgment of the Supreme Court of the State of New York, and a judgment having been entered in the office of the clerk of the county of Columbia on the 20th day of June, 1942, affirming the judgment and order of the Appellate Division, Third Department, and the above named plaintiff having appealed to the United States Supreme Court from the judgment of the Court of Appeals as [fol. 53] remitted to the Supreme Court of the State of New York and from the judgment and order upon remittitur from the Court of Appeals by the Supreme Court of the State of New York, and the said United States Supreme Court having sent to this Court its mandate wherein and whereby it was provided as follows:

"It is ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is hereby reversed with costs

"And it is Further Ordered that the said plaintiff, Chris Pedersen, individually and as Agent, etc., recover against the said defendant Seventy-nine Dollars and Thirty Cents for his costs herein expended and have execution therefor.

"And it is Further Ordered that this cause be, and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court and without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought.

"And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of New York, Columbia County, in order that such execution and further proceedings may be had in the cause, in conformity with the judgment and decree of this court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of certiorari notwithstanding."

[fol. 54] And this Court by order made this day having ordered said judgment and order and mandate of the

United States Supreme Court be made the judgment of this court, and the costs of the plaintiff having been duly taxed at the sum of Six Hundred Twenty-Six Dollars and Sixty-three Cents ($626.63),

Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Adjudged that said judgment, order and mandate of the United States Supreme Court be and the same hereby are made the order and judgment of this court, and the said judgment dismissing the complaint is hereby reversed without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought, and that the plaintiff recover of the defendant the sum of Six Hundred Twenty-Six Dollars and Sixty-three Cents ($626.63), his costs as taxed and that execution issue accordingly.

Dated: April 20, 1943.

Grant A. Miller, Clerk, by Harold I. Hall, Deputy.

[fol. 55] IN SUPREME COURT OF NEW YORK

DEFENDANT'S NOTICE OF MOTION TO DISMISS COMPLAINT

SIRS:

Please Take Notice, that upon the record on appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court herein, and all other papers and proceedings herein, the above named defendant will move this Court at a Special Term thereof appointed to be held in and for the County of Albany at the County Court House in the City of Albany, New York, on May 14, 1943, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for judgment dismissing the complaint and for such other, further and different relief in the premises as may be proper.

Dated: May 3, 1943.

Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office and Post Office Address, 75 State Street, Albany, New York.

To Wilson & Connor, Esqs., Attorneys for Plaintiff.

[fol. 56] IN SUPREME COURT OF NEW YORK

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT—May 21, 1943

At a Special Term of the Supreme Court Held in and for the County of Rensselaer, at the County Court House in the City of Troy, New York, on May 21, 1943

Present: Hon. Sydney F. Foster, Justice.

The above named defendant having duly served a notice of motion dated May 3, 1943, for judgment dismissing the complaint herein, returnable at a Special Term of this Court to be held in the County of Albany on May 14, 1943, and said motion having been duly adjourned to this Term of Court, and the defendant having appeared by Whalen, McNamee, Creble & Nichols, Esqs., its attorneys, in support of said motion, and plaintiff having appeared by Wilson & Connor, Esqs., his attorneys, in opposition thereto, and upon reading and filing said notice of motion, the record on appeal herein, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court and the mandate of the United States Supreme Court herein, and all other papers and proceedings herein, and after due deliberation,

Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Ordered, that said motion made by the defendant for a dismissal of the complaint be, and the same hereby is, denied without costs.

Sydney F. Foster, Justice Supreme Court.

Enter in Columbia County.

[fol. 57] IN SUPREME COURT OF NEW YORK

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT—May 3, 1943

SIRS:

Please Take Notice that upon the annexed affidavit of William E. J. Connor, sworn to the 23rd day of March, 1943, the mandate of the United States Supreme Court dated

February 8, 1943, the order of the Supreme Court of the State of New York on remittitur made the 20th day of April, 1943, and entered in the office of the clerk of the county of Columbia on the 20th day of April, 1943, the judgment on remittitur of the Supreme Court of the State of New York, made the 20th day of April, 1943, duly entered in the office of the clerk of the county of Columbia on the 20th day of April, 1943, upon the record on appeal and all other papers and proceedings herein, the above named plaintiff will move this court at a special term thereof to be held in and for the County of Albany at the County Court House in the City of Albany, New York on the 14th day of May, 1943, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice, and for such other and further relief as to the court may seem just and proper, together with the costs of this motion.

Affidavits to be used in answering the plaintiff's application must be served at least five days before the hearing.

Dated Hudson, N. Y., May 3, 1943.

Wilson & Connor, Attorneys for Plaintiff, Office & P. O. Address, 609 Warren Street, Hudson, New York.

[fol. 58] To: Whalen, McNamee, Creble & Nichols, Esqs., Attorneys for defendant, Office and P. O. Address, 75 State Street, Albany, N. Y.

IN SUPREME COURT OF NEW YORK

PLAINTIFF'S MOVING AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK,
County of Columbia,
City of Hudson, ss:

William E. J. Connor, being duly sworn, deposes and says that he is an attorney and counsellor at law residing in Philmont, New York, and one of the members of the law firm of Wilson & Connor, with office at 609 Warren Street in the city of Hudson, New York. That he is one of the attorneys for the plaintiff in the above entitled matter and since the

16th day of January, 1941, he has had charge of the above entitled litigation.

That on the 16th day of January, 1941, Ransom H. Gillett, an attorney and counsellor at law who resided in the town of New Lebanon and practiced his profession in the city of Albany, County of Albany, New York, died, and your deponent was retained by Ida Mott Gillett, his wife, to settle the estate and take over the practice of the said Ransom H. Gillett and complete any business needing completion. That among the files in the said Ransom H. Gillett's office was the [fol. 59] above entitled file. At that time the file in the above entitled matter indicated that Ransom H. Gillett had done a considerable amount of work on this case. The file even then was very voluminous. The action had been tried in the Supreme Court of the County of Columbia before Mr. Justice Bergan on an agreed statement of facts. The file indicated that in order to compute and ascertain the amount of monies due some forty (40) workmen had required a considerable amount of time, attention and effort. The file indicated that the said Ransom H. Gillett had done considerable research work and had filed a lengthy brief with Mr. Justice Bergan. At that time Mr. Justice Bergan had written an opinion and judgment dismissing the complaint had been entered against the plaintiff.

That the said Ransom H. Gillett had filed a notice of appeal to the Appellate Division of the Third Department. The action had been commenced on the 15th day of June, 1939. While the said Ransom H. Gillett had filed a notice of appeal, this is apparently as far as he had gone with the matter and had not perfected the appeal. Your deponent at that time, together with Mr. William M. Eaton, an attorney and counsellor at law, and formerly of the City of Hudson, County of Columbia and State of New York, and now with the United States Armed Forces, made a thorough investigation of the file and a hurried study of the law applicable to the case, after which both your deponent and Mr. Eaton were convinced that there was a possibility of reversing the decision of Mr. Justice Bergan. Your deponent then prepared the case for appeal, prepared the record on ap- [fol. 60] peal, and prepared a brief on the subject. In order to prepare for the argument of this case your deponent was obliged to spend many days and weeks on the matter due to the fact that the case was brought under the Federal Fair

Labor Standards Act of 1938, and at that time no decisions had reached the United States Supreme Court and it was necessary to examine the law on other similar statutes and to make comparisons of them with the new Federal Fair Labor Standards Act. And in order to do this it was necessary on many occasions for your deponent and his partner Harold Wilson Jr. and Mr. Eaton to go to the City of Albany to use the New York State Law Library since the Columbia County Supreme Court library and other *other* libraries in the city of Hudson were not adequate for the purposes. Moreover, there were a great number of cases being decided all over the United States in the lower Federal courts and since the action could be brought either in Federal or State courts, there were a great many cases being tried in the courts of our sister states and it was necessary to follow these decisions in the states courts and in the lower Federal courts. Your deponent was constantly, throughout the years that this case has been before all of the Courts, corresponding with various attorneys in the United States to keep in contact with many cases on the subject that were being litigated.

Your deponent then argued the case before the Appellate Division and the Appellate Division by a vote of 3-2 sustained Mr. Justice Bergan, Mr. Justice Schenck writing the prevailing opinion of the Court, and Mr. Justice Bliss writ- [fol. 61] ing the dissenting opinion. Your deponent then prepared a notice of appeal to the Court of Appeals of the State of New York, and prepared briefs in the Court of Appeals of the State of New York. In all of the courts before which this has been argued counsel for the defendant served voluminous briefs containing many cases, all of which had to be studied carefully in order to point out any distinctions which might exist. In fact, as the law under the Federal Fair Labor Standards Act began to become settled by the higher Courts of the State and Federal government, and finally by the United States Supreme Court, one by one all of the different arguments raised by counsel for the defendant seemed to be wiped out and each time counsel for defendant would raise new, different and unique reasons for depriving the men whom your deponent represents of the wages due them under the Federal Fair Labor Standards Act, and to cope with such prominent and eminent attorneys required constant study and vigilance.

After the filing of brief and reply brief in the Court of Appeals, your deponent argued the case before the Court of Appeals of the State of New York. In fact your deponent got out of a sick bed against doctor's orders in order to do so. The Court of Appeals, without opinion and unanimously, affirmed the prevailing decision of the Appellate Division, and judgment against the plaintiff with costs was again entered in the Columbia County Clerk's office.

Your deponent was still convinced that the men employed in the repair of a railroad bridge on an interstate railroad [fol. 62] were entitled to the wages fixed by the Federal Fair Labor Standards Act and your deponent then began to prepare to carry the case to the United States Supreme Court. Your deponent was not at that time admitted to practice before the United States Supreme Court and one of the difficult problems placed before your deponent was that the United States Supreme Court was not at that time in session and would not be in session by the time that a writ of certiorari would be required to be filed in the United States Supreme Court. Being unfamiliar with the practice in the United States Supreme Court again required considerable study and work on the part of your deponent and your deponent finally found himself in the position where the only way that the case could be taken to the United States Supreme Court was by having some attorney admitted to practice in the United States Supreme Court collaborate with him on the case. Your deponent then retained Daniel H. Prior, Esq., attorney and counsellor at law of the City of Albany, New York, who was admitted to practice in the United States Supreme Court, to assist him in the case and file the case in his name. Your deponent prepared the writ of certiorari and the brief upon the application for writ of certiorari to the United States Supreme Court, and made several telephone calls to Washington, D. C., to make sure of the proper procedure. The preparation of this brief on the writ of certiorari again required considerable study since on the brief in opposition to the application for a writ of certiorari entirely new and different arguments were raised why the writ should not be granted.

[fol. 63] As soon as the United States Supreme Court convened your deponent went to Washington, D. C., and was admitted to practice before the United States Supreme Court. To do this it was necessary to obtain someone from Washington, D. C., to move your deponent's admission.

All of this required considerable expense, took your deponent away from his office, and his purpose of being admitted to the United States Supreme Court was solely for the purpose of arguing the above entitled case, since your deponent doubts very much that he will ever again have a case in the United States Supreme Court since the records show that no other case in Columbia County in over one hundred years has ever reached the United States Supreme Court.

Your deponent and the said William M. Eaton, as well as the other members of the firm of Wilson & Connor and their associates have done and performed many other acts and services and work in connection with this case not outlined for the reason that the same would make this affidavit too voluminous, because it is believed that the Court can readily see that a case involving the amount of money that the same does, and the nature of the case itself, and the fact that the case has been at issue for nearly four years, has gone through all of the Courts of the State and finally to the United States Supreme Court, and even to the point of an application for a rehearing in the United States Supreme Court, has required considerable work and that the fair and reasonable value of the attorneys' fees should be in a substantial sum. Under the Federal Fair Labor Standards Act the plaintiffs in this action are entitled not only to recover the amount due them for wages, and [fol. 64] another amount for penalty, but they are entitled to recover from the defendant the fair and reasonable value of the attorneys' fees, and it is for this reason that this affidavit is made.

At the present time the plaintiffs are entitled to recover for wages and the penalties and court costs with interest approximately Eleven Thousand ($11,000.00) Dollars, and your deponent believes that the fair and reasonable value of the attorneys' fees is Six Thousand ($6,000.00) Dollars.

William E. J. Connor.

Sworn to before me this 23rd day of March, 1943. Mae Weinstein Commissioner of Deeds Hudson, N. Y.

[fol. 65] IN SUPREME COURT OF NEW YORK

ORDER GRANTING SUMMARY JUDGMENT—May 21, 1943

At a Special Term of the Supreme Court held in and for the County of Rensselaer, at the County Court House in the City of Troy, N. Y., on the 21st day of May, 1943.

Present: Hon. Sydney F. Foster, Justice.

Upon reading and filing the notice of motion herein bearing date the 3rd day of May, 1943, the affidavit of William E. J. Connor, sworn to the 23rd day of March, 1943, the summons and complaint and answer of the defendant herein, the mandate of the United States Supreme Court herein, the judgment of the Supreme Court of the State of New York dated the 20th day of April, 1943, and upon further reading all papers and proceedings heretofore had herein, it satisfactorily appearing therefrom that the defendant has not shown such facts as to entitle it to further defend this action, now after hearing William E. J. Connor, Esq., of Wilson and Connor, in support of the motion, and Henry E. Foley, Esq., arguing for Whalen, McNamee, Creble & Nichols, Esqs., in opposition thereto, and after having studied the briefs concerning the proposition herein involved, and after due deliberation thereon, now on motion of Wilson and Connor, attorneys for the plaintiff, it is

Ordered, that the plaintiff's motion for summary judgment against the defendant herein, under Rule 113 of the Rules of Civil Practice, be and the same hereby is granted, and the answer of the defendant is hereby stricken out, and [fol. 66] judgment is directed for the plaintiff against the defendant for the sum of Seven thousand one hundred and eighty-six and 72/100 dollars ($7,186.72), with interest thereon from the 1st day of April, 1939, together with costs in the Supreme Court of the State of New York, the Appellate Division, Third Department of the State of New York, and the Court of Appeals of the State of New York, together with attorneys' fees as provided in Fair Labor Standards Act, Section 216, in the sum of Three thousand dollars ($3,000), together with Ten dollars ($10) costs of this motion.

Sydney F. Foster, Justice of the Supreme Court.

[fol. 67] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

JUDGMENT—June 16, 1943

The above entitled action having been tried on an agreed statement of facts in the Supreme Court of the State of New York, and a judgment having been heretofore made dismissing the complaint, and the plaintiff having appealed to the Appellate Division, Third Department, of the State of New York, and the Court of Appeals of the State of New York, and a writ of certiorari having been granted by the United States Supreme Court, and the mandate of the United States Supreme Court having been filed in this office, and the motion having been made by the plaintiff for an order striking out the answer of the defendant and for judgment against the said defendant, and said motion having been granted by an order of this court at a Special Term thereof held on the 21st day of May, 1943, which order has been this day duly filed and entered in the office of the Clerk of Columbia County, now on motion of Wilson and Connor, attorneys for the plaintiff, it is

Adjudged, that the plaintiff recover of the defendant the sum of Seven thousand one hundred eighty-six and 72/100 dollars ($7,186.72) with interest thereon from the 1st day of April, 1939, amounting to One thousand eight hundred twenty-four and 30/100 dollars ($1,824.30), together with costs in the sum of Five hundred fifty-seven and 33/100 dollars ($557.33), together with attorneys' fees in the sum of Three thousand dollars ($3,000), amounting in all to Twelve thousand five hundred sixty-eight and 35/100 dollars ($12,568.35), with interest thereon from date, and that execution issue accordingly.

Dated, June 16, 1943.

Grant A. Miller, Clerk.

[fol. 68] IN SUPREME COURT OF NEW YORK

OPINION OF SPECIAL TERM

(Supreme Court, Rensselaer Special Term, May 21, 1943)

Appearances:

Wilson & Connor, Esqs. (William E. J. Connor, of counsel), Attorneys for plaintiff.

Whalen, McNamee, Creble & Nichols, Esqs. (Charles E. Nichols, of counsel) (Argued by Henry E. Foley, Esq.), Attorneys for defendant.

Memorandum

FOSTER, J.

Defendant has moved to dismiss the complaint in this action and the plaintiff has moved for summary judgment.

The action was commenced on June 15, 1939, to recover overtime wages and liquidated damages alleged to be due under provisions of the federal Fair Labor Standards Act of 1938. Plaintiff, and those he represents, were employees of the defendant, and the defendant had performed certain construction work under contract with the New York Central Railroad Company for the repair of four bridges located on the right of way of the Boston & Albany Railroad in the town of Chatham, Columbia County, New York.

The case was tried upon an agreed state of facts at a trial term of the Supreme Court in Albany County in September, 1939. The theory of the plaintiff was that he and his fellow employees were employed in interstate com- [fol. 69] merce, and thus came within the federal Act. It appears from the agreed statement of facts that abutments supporting two of the bridges involved were completely washed out and destroyed by a flood in September, 1938. The substructures of the other two bridges were damaged. The work which the defendant engaged to perform was the construction of new abutments to replace those destroyed, and to repair the substructures of the other two bridges which had been damaged. Mr. Justice Bergan, to whom the case was submitted, dismissed the complaint on the theory that the nature of the work performed by the defendant was local in character and wholly separate from interstate commerce.

An appeal from this decision was taken to the Appellate Division, Third Department, and there the decision of the trial justice was affirmed by a divided court. The conclusion reached by Mr. Justice Schenck, who wrote for a majority of the Appellate Division, was that since defendant was an independent contractor employed by the railroad to perform work local in character, and not itself engaged in interstate commerce, it followed that defendant's employees

were not engaged in such commerce or work so closely connected with it as to be a part thereof. Mr. Justice Bliss dissented on the grounds that all of the bridges involved had been dedicated to and used in interstate transportation prior to the work in question; and that repairs thereto, including the installation of new abutments as well as repairs to the substructures were acts so closely related [fol. 70] to interstate commerce as to be a part thereof. Also that it was the character of the work done which constituted the test as to whether the Fair Labor Standards Act applied and not the fact that the work was performed for the railroad through the medium of an independent contractor not itself generally engaged in interstate commerce.

The Court of Appeals unanimously and without opinion affirmed the decision of the Appellate Division. Thereafter the plaintiffs filed with the United States Supreme Court a petition for a writ of certiorari wherein they sought to review the judgment of dismissal. The United States Supreme Court granted the certiorari and entered an order directing that the judgment be reversed on the authority of *Overstreet v. North Shore Corporation* (No. 284, October Term 1942). The mandate of the Supreme Court of the United States directed that the cause be remanded to the Supreme Court of New York for further proceedings not inconsistent with its opinion. Thereafter this order was modified by adding the following direction: "Without prejudice to the determination of the nature of the employment of any members of the class on whose behalf this suit has been brought."

It is the contention of the defendant that the complaint should be dismissed because the agreed statement of facts does not reveal the individual activity and precise work of any particular plaintiff. The Overstreet case held generally that the same practical test evolved in cases arising under the Federal Employers' Liability Act (prior to the amend- [fol. 71] ment of 1939) should be applied to cases arising under the Fair Labor Standards Act when it became necessary to determine whether an employee was engaged in interstate commerce or any work so closely related to such commerce as to be in practice and legal contemplation a part of it. It also held that the nature of the employer's business is not determinative; that application of the Act de-

pends wholly upon the character of the employees' activities. Defendant cites a large number of cases to sustain the proposition that under the Federal Employers' Liability Act it is necessary for the plaintiff to show his precise activity at the time of injury before there can be a determination that he was engaged in interstate commerce (*Shanks v. Delaware, Lackawanna & Western Railroad Company*, 239 U. S. 556; *Chicago and North Western Railway Company v. Bolle*, 284 U. S. 74; *Chicago and Eastern Illinois Railroad Company v. Industrial Commission of Illinois, et al.*, 284 U. S. 296; *Stoike v. First National Bank of City of New York*, 290 N. Y. 195).

There is no room for argument as to what these decisions hold. The chief difficulty lies, as always, in their application to a given case. It is one thing to apply them to a fixed moment, like the time of an injury, and quite another thing to apply their principles to a group of men over a period of several weeks. If the test is to be applied rigidly it would be necessary for each complaining employee to account for every second of every minute and every minute of every hour, for the time of work takes the place of the time of injury. Obviously such a test is not practical in [fol. 72] any sense of the word and the decision in the Overstreet case does not require so narrow a construction. In a case such as this the test must necessarily be whether the activities of complaining employees were substantially related to the repair of interstate transportation facilities. I mention these matters because I think they have a very definite bearing on a fair construction of the agreed statement of facts.

The pertinent facts are these:

"(2) In September 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by flood.

(3) Thereafter, the railroad company entered into a contract with the defendant, * * * * for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

(6) Defendant employed plaintiffs * * *, as its employees in doing work under contract."

The fair import of these conceded facts is that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing *this particular work*. During the course of this litigation defendant's chief emphasis was placed upon the alleged local character of the work by an independent contractor not itself engaged in interstate commerce, with subordinate emphasis placed upon the fact that work on the [fol. 73] abutments was new construction. To the contrary plaintiff's emphasis was placed upon the claim that the entire work was a repair job to an interstate transportation system irrespective of the fact that the work was undertaken by an independent contractor. I do not find that lack of information concerning the hourly or daily activities of each employee was made a point of attack until the decision of the United States Supreme Court came down, and I think that both parties assumed the construction of the conceded facts which I have indicated. But in any event the conceded facts, in my judgment, embrace no activities not essential to the main work of repair (*Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146). Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made. It is now clear that any distinction between the installation of new abutments and repairs to substructures is immaterial. Otherwise the Supreme Court would have noted such a distinction.

Nor do I regard the modification by the Supreme Court of its original mandate as of vital significance insofar as the foregoing conclusions are concerned. Such modification was granted after a petition by the defendant for a rehearing. It was no more a direction to the plaintiff than it was a permission to the defendant to reopen the matter, if either so desired, and could so do under our practice, for the purpose of getting further proof as to the precise activities of plaintiff and his associates. A new trial was not directed, and in no sense do I regard the modification as a finding that the agreed facts were insufficient upon [fol. 74] which to base a judgment.

Under the circumstances the motion to dismiss the complaint should be denied without costs, and the motion by

plaintiff for summary judgment should be granted with $10.00 costs of the motion. Plaintiff and those he represents may have judgment for overtime wages, as covered by the agreed statement of facts and as found on the original trial, plus an equal amount as liquidated damages, with costs of the action to date in all courts except the Supreme Court of the United States. Costs in that court have been provided for separately. The federal statute provides that, in addition to such a judgment, a reasonable attorney's fee must be allowed, and apparently does not require proof to be taken in order to fix the same (Fair Labor Standards Act, Section 216). Under the circumstances I think a fee of $3,000 is not unreasonable.

June 8, 1943.

[fols. 75-76] In Supreme Court of New York

Stipulation Waiving Certification

It Is Hereby Stipulated, pursuant to Rule 234, that the foregoing are true and correct copies of the notice of appeal, the original record on appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court, plaintiff's notice of motion for summary judgment, defendant's motion for judgment dismissing complaint, all opinions rendered herein, and all papers upon which the Special Term acted in granting the order and judgment appealed from, the order and judgment appealed from and the order denying defendant's motion also appealed from, all of which are on file in the office of the Clerk of Columbia County, together with copy of opinion of Special Term, and certification thereof by the Clerk of Columbia County is hereby waived.

Dated: July —, 1943.

Wilson & Connor, Attorneys for Respondent; Whalen, McNamee, Creble & Nichols, Attorneys for Appellant.

[fol. 77] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—January 10, 1944

SIRS:

Please Take Notice that the above named defendant, J. F. Fitzgerald Construction Company, hereby appeals to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 23, 1943, in the office of the Clerk of the County of Columbia, upon an order of said Appellate Division made at a term thereof commencing September 13, 1943, and entered in the office of the Clerk of said Appellate Division on November 18, 1943, whereof a certified copy was entered in said County Clerk's office on November 23, 1943, which order and judgment of said Appellate Division affirmed with costs the judgment herein entered in the office of the Clerk of the County of Columbia on June 16, 1943, [fol. 78] and an order entered in the same Clerk's office on the same day granting summary judgment in favor of plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint, and said defendant appeals from each and every part of said judgment of said Appellate Division and from the whole thereof.

Dated: January 10, 1944.

Yours, etc., Whalen, McNamee, Creble & Nichols, Attorneys for Defendant, Office & Post Office Address, 75 State Street, Albany, New York.

To: Wilson & Connor, Esqs., Attorneys for Plaintiff and Clerk of the County of Columbia.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—THIRD DEPARTMENT

[Title omitted]

ORDER OF APPELLATE DIVISION—November 18, 1943

The appeal taken by the above appellant from a judgment herein entered in Columbia County Clerk's office on June

16, 1943, and from an order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, [fol. 80] and from an order entered June 18, 1943, denying respondent's motion to dismiss the complaint, having been argued at this term of the Court on behalf of the appellant by Henry E. Foley, Esq., of counsel for Whalen, McNamee, Creble, & Nichols, and by William E. J. Connor, Esq., of counsel for Wilson & Connor, attorneys for the respondent, and after due deliberation this Court having handed down its decision herein on November 10, 1943,

Now, on motion of Wilson & Connor, attorneys for the respondent, it is ordered that the order entered June 18, 1943, denying appellant's motion to dismiss the complaint be and same hereby is affirmed with $10.00 costs and disbursements,

And on motion of Wilson & Connor, attorneys for the respondent, it is, with Mr. Justice Schenck dissenting, ordered that the judgment and order of June 16, 1943, appealed from be and the same hereby are affirmed with costs to the respondent.

John S. Herrick, Clerk.

A true copy.
John S. Herrick, Clerk. (Seal.)
Ent. 11/18/43.

[fol. 81] Sir:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action on the 13th day of Sept., 1943, and duly entered in the office of the Clerk of the County of Columbia on the 23rd day of Nov., 1943.

Dated: Hudson, N. Y., November 23, 1943.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, New York.

[fol. 82] In Supreme Court of New York, Columbia County

[Title omitted]

Judgment on Order of Appellate Division—November 23, 1943

The above named defendant having appealed to the appellate Division of the Supreme Court, Third Department,

from the judgment in the above entitled action duly entered in the Columbia County Clerk's office on the 16th day of June, 1943, and from an order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, and from an order entered June 18, 1943, denying respondent's motion to dismiss the complaint, and said Appellate Division, by its Order entered in the office of the Clerk thereon on November 18th, 1943, a certified copy of which, together with the original Record on Appeal, has has been this day filed in the office of said County Clerk, having affirmed with costs to the plaintiff against the defendant said judgment and orders so appealed from, and said plaintiff's costs having been duly taxed at the sum hereinafter stated,

[fol. 83] Now, on motion of Wilson & Connor, attorneys for the plaintiff, it is

Adjudged that said judgment entered in the office of the Clerk of the County of Columbia on June 16, 1943, and said order entered in the Columbia County Clerk's office on June 16, 1943, granting summary judgment, and said order entered June 18, 1943, denying respondent's motion to dismiss the complaint, be, and the same hereby are affirmed and that the plaintiff recover of the defendant the sum of $71.65, its costs, and that execution issue accordingly.

Dated: November 23, 1943.

Grant A. Miller, Clerk.

By Harold I. Hall, Deputy.

Sir:

Take notice of a Judgment of which the within is a copy, duly made in the within entitled action, on the 23rd day of November, 1943, and duly entered in the office of the Clerk of the County of Columbia on the 23rd day of November, 1943.

Dated: Hudson, N. Y., November , 1943.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, New York.

[fol. 84] In Supreme Court of New York, Appellate Division—Third Judicial Department

[Title omitted]

Decison of Appellate Division

Appeal from summary judgment granted under Rule 113 of the Rules of Civil Practice and an order denying defendant's motion to dismiss the complaint. For previous history of the case see: 173 Misc. 188; 262 A. D. 665; 288 N. Y. 687; 318 U. S. 740; and 318 U. S. 742.

Judgment and orders affirmed, with costs.

Hill, P. J., Crapser, Bliss and Heffernan, JJ., Concur.

Schenck, J., dissents; in an opinion.

(No opinion written unless indicated hereon.)

[fol. 85] Dissenting Opinion in Appellate Division

Schenck, J.:

Plaintiff brought this action in his own behalf, and as representative of certain other employees of defendant, styled in the complaint as co-plaintiffs, to recover overtime wages and an equivalent amount as liquidated damages, pursuant to the provisions of sections 7 and 16 of the Federal Fair Labor Standards Act of 1938 (29 U. S. Code §§207 [a], 216 [b]). The case was first tried before Mr. Justice Bergan on an agreed statement of facts, of which the following parts are material upon this appeal:

"1. The New York Central railroad Company, as lessee of the Boston and Albany Railroad, operated trains between the States of New York and Massachusetts over four bridges located on the railroad right of way in the Town of Chatham, Columbia County, New York.

"2. In September, 1938, abutments supporting two of said bridges were completely washed out and destroyed and the substructures of the other two bridges were damaged by a flood.

"3. Thereafter, the railroad company entered into a contract with the defendant, an independent con-

tractor engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged, as aforesaid.

* * * * * * *

[fol. 86] "6. Defendant employed plaintiffs, together with other individuals, as its employees in doing work under said contract and paid them at the rates per hour, as shown on Schedule 'A' annexed hereto.

* * * * * * *

"10. After October 24, 1938, until the completion of said work by the defendant under said contract, each plaintiff worked for defendant the number of hours per week and was paid by the defendant at the hourly rate of pay as shown on Schedule 'A' annexed hereto."

Dismissal of the complaint by Mr. Justice Bergan (173 Misc. 188) was affirmed by this Court (262 App. Div. 665) and in the Court of Appeals (288 N. Y. 687).

Application by plaintiff to the Supreme Court of the United States for a review of the judgment entered upon the remittitur from the Court of Appeals resulted in the following decision (318 U. S. 740) announced February 8, 1943: "Per Curiam: Petition for writ of certiorari granted. Judgment reversed on the authority of *Overstreet v. North Shore Corporation*," which had been decided February 1, 1943 (318 U. S. 125). It is stated in plaintiff's brief on this appeal, as also on the oral argument thereof before this Court, that the reversal by the Supreme Court was without having heard argument, for which defendant thereafter applied, with the result that on March 8, 1943, the Supreme Court amended its judgment of reversal by adding thereto the following: "and without prejudice to a determination of the nature of the employ-[fol. 87] ment of any members of the class on whose behalf this suit has been brought" (318 U. S. 742). The mandate of the Supreme Court of the United States, under date of March 18, 1943, remanded the case to the Supreme Court

of this State "in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein," whereupon an order was entered in Columbia County Clerk's office conformable with the mandate.

Under date of May 3, 1943, defendant, "upon the record on Appeal, the judgments of the Appellate Division, Third Department, Court of Appeals, United States Supreme Court, the mandate of the United States Supreme Court herein, and all other papers and proceedings herein," noticed a motion at the Albany County Special Term "for judgment dismissing the complaint." Under the same date, upon the affidavit of Mr. Connor, one of plaintiff's attorneys, the mandate of the Supreme Court of the United States, the order and judgment of the Supreme Court of this State entered thereon and "upon the record on appeal and all other papers and proceedings herein," plaintiff noticed a motion for the same Special Term "for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice, and for such other and further relief as to the court may seem just and proper, together [fol. 88] with the costs of this motion." Pursuant to an opinion at Special Term, defendant's motion for a dismissal of the complaint was denied by the order entered June 18, 1943; and plaintiff's motion for summary judgment was granted by the order entered June 16, 1943, on which judgment in accordance therewith was entered, awarding to plaintiff against defendant damages in the amount of $7,186.72, besides interest thereon amounting to $1,824.30, costs of $557.33 and attorneys' fees of $3,000, an aggregate of $12,568.35. For several reasons the judgment thus entered and the order directing its entry cannot stand:

1. As a matter of practice, plaintiff's motion, purporting on its face to be "for summary judgment in favor of the plaintiff and against the defendant, in accordance with the provisions of Rule 113 of the Rules of Civil Practice," was nothing of the kind. To sustain a summary judgment under Rule 113, "there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a

failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense. The case must take the usual course if less than this appears" (*Curry v. Mackenzie*, 239 N. Y. 267). The order granting summary judgment contains a recital "that the defendant has not shown such facts as to entitle it to further defend this action," but a defendant is not required to make such a showing unless and until plaintiff has first established by affidavit what is *prima facie* a proper case for summary judg-
[fol. 89] ment (*Tidewater Oil Sales Corporation v. Pierce*, 213 App. Div. 796; *Connor v. Commercial Travelers Mutual Accident Association of America*, 247 App. Div. 352). Furthermore, the moving papers on an application under Rule 113 are insufficient if they contain no averment of plaintiff's belief that there is no defense to the action (*Universal Credit Company v. Uggler*, 248 App. Div. 848). Here plaintiff's moving affidavit meets none of the requirements of the Rule, but, obviously with a view to affording a basis for an allowance for attorney's fees under the Federal Act, is confined to a detailed statement of the services performed by plaintiff's attorneys in the prosecution of this action.

2. Moreover, the Supreme Court of the United States manifestly contemplated a trial of this case upon the merits, else it would have directed the entry of a judgment in favor of plaintiff instead of modifying on March 8, 1943, its judgment of the preceding February 8th by adding thereto the provisions that such judgment be "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought."

3. Passing from consideration of questions of practice to the merits, it is apparent that the Supreme Court thus modified, on March 8, 1943, its judgment of the previous February 8th because it recognized the need for proof of his engagement by defendant in interstate commerce before any plaintiff could recover herein. So the Supreme Court had held in *Overstreet v. North Shore Corporation* (318 U. S. 125), decided February 1, 1943, one week before the
[fol. 90] date of its decision herein granted certiorari and reversing the judgment below. Its ruling in the *Overstreet* case was but a reiteration (p. 132) of earlier pronounce-

ments by the Supreme Court that "the application of the Act depends upon the character of the employees' activities" (*Kirschbaum Co. v. Walling*, 316 U. S. 517, 524; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571), the controlling effect of which the Court of Appeals has very recently recognized (*Stoike v. First National Bank*, 290 N. Y. 195, 201).

4. To be entitled to recover herein, each plaintiff must establish that his employment by defendant was in interstate commerce, or was so closely related to such commerce "as to be in practice and in legal contemplation a part of it," and whether such was the nature of his engagement is determinable by the same tests which control in cases involving classification within or without the Federal Employers' Liability Act. (*Overstreet v. North Shore Corporation, supra; Stoike v. First National Bank, supra.*)

5. It remains to consider whether the terms of the agreed statement of facts, hereinbefore quoted, are broad enough to justify the deduction, expressed in the opinion of the learned Justice at Special Term, "that defendant was engaged in certain work, and that plaintiff and his associates were its employees, not generally, but in doing this particular work. * * * Such, I think, was the fair import of the facts as contemplated by the parties when the agreed statement was made." In reaching such conclusion the opinion below stressed paragraphs 2, 3 and 6 of the [fol. 91] agreed statement of facts hereinbefore set forth. But in *McLeod v. Threlkeld* (No. 787, Oct. Term, 1942), decided June 7, 1943, the day before the date of the Special Term's opinion herein, the Supreme Court recognized that an employee's task may be substantially related to repair work upon an instrumentality of interstate commerce, and yet may not be "so closely related to interstate transportation as to be in practice and legal relation a part thereof." By that decision a recovery under the Federal Fair Labor Standards Act was denied to a cook who prepared and served meals for a gang engaged in repairing a railroad's tracks devoted to interstate transportation. It is fair to assume that the *McLeod* case was not brought to the attention of the court below, else its opinion would have referred thereto if, indeed, the decision in that case might not have impelled the court below to a different disposition of plain-

tiff's motion for judgment. The most that can fairly be inferred from the agreed statement of facts is that plaintiffs did work in connection with the construction and repair project on which defendant was engaged, there being nothing in the record to indicate the relationship which the respective tasks of the several plaintiffs bore to the construction and repair work. Thus, plaintiff A would be entitled to recover if his task was to tamp ballast between the ties of the tracks. (*N. Y. C. R. R. Co. v. Winfield*, 244 U. S. 147.) Not so plaintiff B if his task was to supply dry sand to an engine used in the work of construction and repair. (*Erie R. R. Co. v. Szary*, 253 U. S. 86, as overruled [fol. 92] in *Chicago & Eastern Ill. R. R. Co. v. Ind. Comm.*, 288 U. S. 296.) Plaintiff C could recover herein if his job was to flag trains in transit interstate over the tracks while the work of construction and repair was in progress. (*Phila. & Reading Ry. Co. v. DiDonato*, 256 U. S. 327.) But not plaintiff D if he was a cook who prepared and served meals for the repair and construction gang. (*McLeod v. Threlkeld, supra.*) Hence the need, under the doctrine of the *Overstreet* and *McLeod* cases, *supra*, that each plaintiff, as a condition precedent to recovery herein, establish not merely that he was employed by defendant "in doing work under said contract," as stipulated in the agreed statement of facts, but also that his task bore such a close relation to interstate commerce "as to be in practice and in legal contemplation a part of it." On the authority of *Warren-Bradshaw Drilling Co. v. Hall* (317 U. S. 88) the Court of Appeals has observed: "There seems to be no question that the federal statute casts upon the plaintiff the burden of proving that in the performance of work for which he was employed by the defendant he was engaged in interstate commerce or in the production of goods for interstate commerce during the period of asserted overtime employment." (*Stoike v. First National Bank, supra*, p. 200.) From the burden so imposed the several plaintiffs in this case have not been relieved by the agreed statement of facts.

While reversal of the judgment which we are reviewing would relieve defendant of the interest and of the item for costs in which were included those on the former appeal to this court and on the appeal to the Court of Appeals, [fol. 93] it would seem proper to say, for the guidance of the

court on a new trial, that plaintiff's claim for an award of interest on the damages recovered runs counter to the principle which controlled the decision in *Murmann v. N. Y., N. H. & H. R. R. Co.* (258 N. Y. 447). Nor, unless awarded by this court or by the Court of Appeals (and they have not been in this case), can the costs of those appeals be recovered by plaintiff, since the Special Term was without power to award them. (*Green v. Supreme Council of Royal Arcanum*, 91 Misc. 606; 11 Carmody §417; *People ex rel. Keene v. Supervisors*, 83 Hun. 237.) Costs can only be awarded pursuant to statutory provisions (*Osborn v. Cardoza*, 208 N. Y. 131), and Article 85 of the Civil Practice Act will be searched in vain for the grant of power in a trial court to award costs of earlier appeals. Section 1490 of the Civil Practice Act, cited by plaintiff, is inapplicable to the situation with which we are dealing, for the judgment of this court and of the Court of Appeals, awarding costs to defendant, as a successful respondent, have been reversed, while plaintiff, as appellant on those appeals, could have become entitled to costs of his appeals in the State courts only had he secured a reversal there. This is, therefore, a case where neither party is entitled by statute to costs of the appeals taken by plaintiff to the State courts. (*Price v. Price*, 61 Hun. 604, 606; *Matter of Protestant Episcopal Public School*, 86 N. Y. 396.)

The Court below properly denied defendant's motion for a dismissal of the complaint. On the argument before us [fol. 94] the question was raised whether defendant, by making that motion, had conceded the allegations of the complaint, as would undoubtedly be true had the motion been made on the pleadings only, under Rule 112 of the Rules of Civil Practice; but defendant's notice of motion, "for judgment dismissing the complaint," specified not only the pleadings but also "all other papers and proceedings herein" which, under §476 of the Civil Practice Act, included the admissions contained in the agreed statement of facts. Those admissions, however, though insufficiently broad to justify, without proof, a recovery in favor of each plaintiff, are comprehensive enough to withstand a dismissal of the complaint upon motion. Plaintiff and his co-plaintiffs are entitled to make proof in support of the allegation in the complaint that they "were so engaged in interstate commerce in work on the said bridges as employees

of the defendant," taken in connection with the concession in the agreed statement of facts that defendant employed them "in doing work under said contract." That such work brought them within the provisions of the Fair Labor Standards Act is for each plaintiff to prove.

The summary judgment and order entered June 16, 1943, awarding plaintiff a recovery, should be reversed on the law and the facts, with costs to appellant, and plaintiff's motion for summary judgment denied, with $10 costs. The order, entered June 18, 1943, denying appellant's motion to dismiss the complaint, should be affirmed, with $10 costs and disbursements.

[fol. 95] IN THE COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION WAIVING CERTIFICATION—January 20, 1944

It Is Hereby Stipulated, pursuant to §170 of the Civil Practice Act, that the foregoing printed copies of Notice of Appeal to the Appellate Division, the original Record on Appeal herein, the judgments of the Appellate Division, Third Department, Court of Appeals, and United States Supreme Court, the mandate of the United States Supreme Court, plaintiff's notice of motion for summary judgment and moving affidavit, defendant's notice of motion for judgment dismissing complaint, the order denying defendant's motion, the order granting summary judgment, the judgment of Supreme Court, Columbia County, together constituting all papers before the Appellate Division, Third Department, upon which said Appellate Division acted in granting the order and the judgment appealed from, the order of the Appellate Division, the judgment appealed [fol. 96] from, and the notice of appeal to the Court of Appeals, are true and correct copies of the whole respective originals thereof now on file and of record in the office of the Clerk of the County of Columbia, and that certification of such copies by said Clerk is hereby waived and that the foregoing printed copies of the decision of the Appellate Division and the dissenting opinion in the Appellate Division are true and correct copies of the originals thereof

and that the Appellate Division wrote no opinion herein other than said decision and said dissenting opinion.

Dated: January 20, 1944.

Wilson & Connor, Attorneys for Respondent. Whalen, McNamee, Creble & Nichols, Attorneys for Appellant.

[fol. 97] IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—June 14, 1944

CHRIS PEDERSEN, ind. and as agent, &c., for and in behalf of himself, &c., Respondent,

ag'st

J. F. FITZGERALD CONSTRUCTION COMPANY, Appellant

Be It Remembered, That on the 21st day of February in the year of our Lord one thousand nine hundred and forty-four, J. F. Fitzgerald Construction Company, the appellant in this cause, came here unto the Court of Appeals, by Whalen, McNamee, Creble & Nichols, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And [fol. 98] Chris Pedersen, individually, and as agent &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Wilson & Connor, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles E. Nichols of counsel for the appellant, and by Mr. William E. J. Connor of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provid d, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 99] Court of Appeals, Clerk's Office, Albany, June 14, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal) John Ludden, Clerk.

[fol. 100] In Supreme Court of New York

Chris Pedersen, Individually and as Agent and Representative for and in Behalf of Himself and all other Employees of the Defendant Similarly situated, Plaintiff,

against

J. F. Fitzgerald Construction Company, Defendant

At a Special Term of the Supreme Court held in and for the County of Ulster, at the Court House in the City of Kingston, on the 21st day of June, 1944.

Present: Hon. Harry E. Schirick, Justice.
Supreme Court: Columbia County.

Order on Remittitur

The above named defendant having appealed to Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court, Third Department, entered in the above entitled action on November 23, 1943, in the office of the Clerk of the County of Columbia, which judgment affirmed the judgment herein entered in

the office of the Clerk of the County of Columbia on June 16, 1943, and an order entered in the same Clerk's office on the same day granting summary judgment in favor of the plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint, and said appeal having been duly argued in said Court of Appeals and after due deliberation, said Court of Appeals having ordered and adjudged that the judgment so appealed from, as aforesaid, be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law;

Now on reading and filing the remittitur from the Court of Appeals herein, and on motion of Wilson & Connor, [fol. 101] Esqs., attorneys for the plaintiff, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court.

Harry E. Schirick, Justice Supreme Court.

Enter in Columbia County.

Sir:

Take notice of an Order of which the within is a copy, duly granted in the within entitled action, on the 21st day of June, 1944, and duly entered in the office of the Clerk of the County of Columbia on the 22nd day of June, 1944.

Dated, Hudson, N. Y., June 22, 1944.

Wilson & Connor, Attorneys for Plaintiff, Office and Post Office Address, 609 Warren Street, Hudson, N. Y.

To Whalen, McNamee, Creble & Nichols, Attorneys for Defendant.

[fol. 102] IN SUPREME COURT OF NEW YORK, COLUMBIA COUNTY

CHRIS PEDERSEN, Individually and as Agent and Representative for and in behalf of Himself and all other Employees of the Defendant Similarly Situated, Kinderhook, N. Y. Plaintiff,

against

J. F. FITZGERALD CONSTRUCTION COMPANY, 214 Essex Street, Boston, Mass. Defendant

JUDGMENT ON REMITTITUR

A judgment in the above entitled action having been entered in the office of the Clerk of Columbia County on November 23, 1943, upon the order of the Appellate Division of the Supreme Court, Third Department, affirming the judgment herein entered in the office of the Clerk of the County of Columbia on June 16, 1943, and an order entered in the same Clerk's office on the same day granting summary judgment in favor of the plaintiff against defendant, and an order entered in the same Clerk's office on June 18, 1943, denying defendant's motion to dismiss the complaint and the above named defendant having appealed to the Court of Appeals of the State of New York from said judgment of the Appellate Division, and said Court of Appeals having sent to this Court its remittitur, filed herewith, from which it appears that the said Court of Appeals has affirmed the said judgment of the Appellate Division with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court, by an order entered herein this day having ordered that the said judgment of the Court of Appeals be made the judgment of this Court, and the costs of the plaintiff having been duly taxed at the sum of One Hundred Twenty-eight Dollars and Fifty-four Cents ($128.54),

[fol. 103] Now, on motion of Wilson & Connor, Esqs., attorneys for the plaintiff, it is

Adjudged, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and that said judgment of the Appellate Division be, and the same hereby is, in all

things, affirmed, and that the plaintiff recover of the defendant the sum of One Hundred Twenty-Eight Dollars and Fifty-four Cents ($128.54), his costs as taxed, and that execution issue accordingly.

Dated: June 19, 1944.

Grant A. Miller, Clerk.

By Harold L. Hall, Deputy.

Sirs:

Take notice of a Judgment of which the within is a copy, duly entered in the office of the Clerk of the County of Columbia on the 22nd day of June, 1944.

Dated, Hudson, N. Y., June 22, 1944.

Wilson & Connor, Attorneys for Plaintiff, Office & Post Office Address, 609 Warren Street, Hudson, New York.

To Whalen, McNamee, Creble & Nichols, Attorneys for Defendant.

[fol. 104] In the Court of Appeals of New York

Chris Pedersen, Individually and as Agent and Representative for and in behalf of Himself and All Other Employees of the Defendant Similarly Situated, Respondent, v. J. F. Fitzgerald Construction Company, Appellant.

Appeal from a judgment entered November 23, 1943, upon an order of the Appellate Division of the Supreme Court in the third judicial department which affirmed an order of Special Term (Foster, J.) granting a motion by plaintiffs for summary judgment and denying a motion by defendant for dismissal of the complaint.

Charles E. Nichols and Henry E. Foley of Boston, Massachusetts, for appellant.

William E. J. Connor for respondent.

Opinion—June 14, 1944.

Loughran, J.:

This action was brought under section 16-b of the Fair Labor Standards Act by employees against their employer to recover overtime compensation plus an equivalent amount as liquidated damages. The question was whether at the time in issue the plaintiffs were "en-

gaged in commerce" in the sense of that phrase as used in sections 6 and 7 of the Act. (See *Stoike* v. *First National Bank*, 290 N. Y. 195.)

Special Term dismissed the complaint (173 Misc. 180) and its judgment was affirmed by the Appellate Division (262 App. Div. 665) and by this court (288 N. Y. 687). The Supreme Court of the United States reversed and by its mandate sent the case back to the Supreme Court of New York for further appropriate proceedings, but "without prejudice to a determination of the nature of the employment of any members of the class on whose behalf this suit has been brought." (318 U. S. 740, 742.) After that ultimate decree had in due course been made the judgment of the Supreme Court of New York, the plaintiffs moved [fol. 105] for a summary recovery under rule 113. Special Term granted that motion and denied a cross motion by the defendant for dismissal of the complaint. The Appellate Division affirmed, one Justice dissenting, and the controversy is now before us a second time on an appeal by the defendant from that determination.

The case was originally submitted upon an agreed statement of facts which has never been altered in any way. It is thereby stipulated that the work on which the plaintiffs' claims are based was done by them under a contract through which the defendant undertook with a railroad company to reconstruct two bridges that were instrumentalities of interstate commerce. (262 App. Div. 665, 667.). These conceded facts are now said by the defendant to be insufficient as a basis for disposition of the issue as to whether the plaintiffs were "engaged in commerce" at the time they were so employed.

We concur with the courts below in their rejection of that contention. The agreed statement of facts on the face of it was a case within the statute. (*McLeod* v. *Threlkeld*, 319 U. S. 491, 494.) No other or different showing was attempted by the defendant on the present motions, despite the proviso we have quoted from the mandate of the higher court. On the record as it stood, a summary judgment for the plaintiffs was inevitable.

The remaining questions have to do with costs and interest that were allowed to the plaintiffs.

The award to them of costs in all courts was not unauthorized. (Civ. Prac. Act, § 1470, subd. 11; *Murtha* v. *Curley*, 92 N. Y. 359, 361-362.) *Stevens* v. *Central Savings*

Bank (168 N. Y. 560) is not authority for a different view. In the *Stevens* case this court was reversed by the Supreme Court of the United States on one point, but the substance of our judgment in favor of the plaintiffs was left undisturbed and in that situation the defendants were not to be treated as parties who had ultimately prevailed.

[fol. 106] As we read the Federal cases, the liability for liquidated damages under the Fair Labor Standards Act is contractual in character. (*Overnight Motor Co.* v. *Missel*, 316 N. Y. 572, 583; *Northwestern Yeast Co.* v. *Broutin*, 133 F. 2d. 628; see, too, *Cox* v. *Lykes Brothers*, 237 N. Y. 376; *Wright* v. *State of New York*, 223 N. Y. 44; *Calvin* v. *Huntley*, 178 Mass. 29.) In that view, the plaintiffs were entitled to interest on the whole of their recovery including the liquidated damages. (Civ. Prac. Act, § 480; see *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498.)

The judgment should be affirmed, with costs.

Lehman, Ch. J. (Dissenting in part). I dissent only from so much of the decision as holds that the plaintiff is entitled to interest on the "stipulated damages," which under the statute, must be paid by any employer who violates the provisions of sections 6 and 7 of the Fair Labor Standards Act. The liability for such payment, though not a penalty, is imposed in the statute as liquidated damages for the "retention of a workman's pay." They are so denominated in the statute and they are intended to provide "compensation" for injury suffered by a wrongful act which "may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Overnight Motor Transportation Co., Inc., v. Missel*, 316 U. S. 572.) Section 480 of the Civil Practice Act, does not, I think, apply in such case. The question has not heretofore been raised in any case where this court has affirmed a judgment which included interest on stipulated damages.

Rippey, Lewis and Desmond, JJ., concur with Loughran, J.; Lehman, Ch. J., dissents in part in separate opinion in which Conway and Thacher, JJ., concur.

Judgment affirmed.

[fol. 107] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 108] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1944

A petition for rehearing having been filed in this case by counsel for petitioner to remove the limitation imposed by order of November 6, 1944, granting the petition for certiorari herein,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted, and the order of November 6, 1944, is vacated.

It is further ordered that the petition for certiorari herein be, and the same is hereby, granted.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.